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94-1502

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DUQUESNE LIGHT COMPANY,

Petitioner,

v.

FREDERICK R. CLAUS,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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2. This Court's interpretation of 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), has been legislatively overruled by the Civil Rights Act Amendments of 1991. An issue involving the application of the holding of *Patterson v. McLean Credit Union* is by definition not worth reviewing 17

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STATUTORY PROVISIONS INVOLVED

The Civil Rights Act Amendments of 1991, Pub. L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071, designated then existing 42 U.S.C. § 1981 as subsection (a) and added subsections (b) and (c):

42 U.S.C. § 1981. **Equal rights under the law**

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

COUNTERSTATEMENT OF THE CASE

A. The Case in General

In this employment discrimination case filed in the United States District Court for the Western District of Pennsylvania, plaintiff Claus alleged that he had been denied promotion to the vacant position of Manager, Construction and Engineering, Eastern Division ("MCE") on March 1, 1988 because his employer, Duquesne Light, promoted James A. Griffin ("Griffin") to that position because of Griffin's race, black. Claus brought suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (Count I) and under 42 U.S.C. § 1981 (Count II).

Claus then filed an amended complaint on July 31, 1991, alleging that he had been denied promotion to a second vacant position, Manager, Construction Coordination and Underground, Western Division ("MCCU") in retaliation for his having filed an EEOC complaint as a result of the MCE promotion denial. Claus again invoked both Title VII and 42 U.S.C. § 1981. After enactment of the Civil Rights Act Amendments of 1991, Pub. L. 102-166, Claus amended his complaint to claim damages available under that Act.

When the case came to trial in November, 1993, the District Court (Standish, J.) decided that the best procedure

was to try the case to a jury as if the CRA of 1991 were fully retroactive. The District Court believed that trial as if the CRA of 1991 were retroactively applicable would make it possible to avoid a retrial regardless of the retroactivity decision of this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express*, Inc., 114 S.Ct. 1510 (1994). Both of the CRA of 1991 retroactivity cases, *Landgraf* and *Rivers*, had been argued in this Court and were pending decision. The District Court stated that if, however, the case were tried as if the CRA of 1991 were not retroactive and this Court then held the CRA of 1991 retroactively applicable, a retrial would be unavoidable. Conservation of judicial resources, therefore, counseled that the case should be tried as if the CRA of 1991 were fully applicable.

The case was then tried before Judge Standish and a jury from November 30, 1993 to December 14, 1993. The case was bifurcated between liability and damages. The jury, at the conclusion of the liability phase, was provided a special verdict slip with four separate questions which the jury answered as follows:

1. Do you find that the defendant employee, James Griffin, was qualified for promotion to the position of Manager, Construction & Engineering, when defendant promoted him to that position in March, 1988?

Jury's Answer: Yes.

2. Do you find that when defendant promoted its employee, James Griffin, to the position of Manager, Construction & Engineering, in March, 1988, defendant did so in accordance with its valid, written Affirmative Action Plan?

Jury's Answer: No.

3. Do you find that if defendant had not promoted its employee, James Griffin, to the position of Manager, Construction & Engineering, it would not have promoted plaintiff to that position?

Jury's Answer: No.

4. Did you find that plaintiff's filing or pursuit of a claim against defendant before the Equal Employment Opportunity Commission was a determining factor in defendant's decision not to promote plaintiff to the position of Manager, Construction Coordination & Underground?

Jury's Answer: Yes.

Based on the jury's answers, Judge Standish concluded that plaintiff had established liability on both the failure to promote to MCE claim and the retaliation claim.

The case then proceeded to a trial on damages. The parties stipulated to the amount of back pay with interest

($64,304.59) and the amount by which Claus' income would be increased in the future. The jury on December 14, 1993 returned the following damage verdict in favor of Claus:

On failure to promote to MCE position:	
Compensatory:	$ 5,000
On failure to promote to MCCU position:	
Compensatory	$ 20,000
Punitive	$ 400,000

The District Court then molded the jury's verdicts and entered judgment on December 21, 1993.

B. MCE Promotion Claim: Racial Discrimination

Claus at the time of trial had worked for DLCO for 29 years and 10 months. He graduated from the University of Pittsburgh in 1964 with a degree of bachelor of science in electrical engineering. During his career with DLCO, he had occupied a variety of positions within the Transmission & Distribution Division ("T&D"), chiefly performing

engineering work. "Transmission" refers to the process of bringing electrical power from the power plant to a local distribution center; "distribution" refers to the process of bringing electrical power from the distribution center to the user.

In November, 1987, the position of MCE, Eastern Division, became vacant. Claus was at that time the Director of Engineering of the Western Division of the Marketing and Customer Services Group. Claus' position was a Pay Level 19 position; the MCE position was a Pay Level 21 position. Claus applied in writing for promotion to the MCE vacancy.

Five DLCO employees were considered for the MCE position. Four candidates were white; one (James Griffin) was black. The written job description for the MCE position, last reviewed and revised in May, 1987, set forth six "Qualifications" for the job. The first two were:

> 1. Bachelor of Science degree in engineering.
>
> 2. Seven years' experience in transmission and distribution design, construction and maintenance, or operation work with three years' supervisory experience.

Claus and the other white candidates all possessed these two qualifications. Griffin, the black, did not. He had neither an engineering degree nor had he ever worked in a T&D function. Griffin had been put forward for consideration by

Joseph Zagorski, at the time the Manager of Human Resources of the Marketing & Customer Services Group.

Thomas Nist, the Manager of the Eastern Division, interviewed the present supervisors of all five candidates. Based on the supervisors' evaluations, Claus was rated second and Griffin was rated last. Under the evaluation category of "Minimum Qualifications," Griffin's then supervisor gave him a 2 out of 5, which translates on DLCO's rating scale into "less than acceptable." Claus under the same category had a 5 out of 5, which translates "much more than acceptable."

Nist then personally interviewed the candidates. Nist ranked one Richard Sikora most qualified. He ranked Claus second. Nist ranked Griffin next to last, and again gave him a "less than acceptable" rating (2 out of 5) in the "Minimum Qualifications" category.

Nist then met with his superior, Roger D. Beck, Vice-President of the Marketing & Customer Services Group, to discuss the promotion. Beck told Nist that higher management in DLCO had decided to appoint Sikora to a position other than MCE in the near future, and that Sikora was, therefore, "basically eliminated" from consideration. The removal of Sikora as a candidate moved Claus into first place.

Beck and Nist then discussed promoting Griffin to the MCE vacancy because he was a black, notwithstanding

his inability to satisfy the first two "Qualifications."

Nist then on February 12, 1988 promoted Griffin to the MCE position. In his trial testimony, Nist candidly acknowledged that Griffin's race was a factor, and that had Griffin not been black, then Nist would not have promoted him to MCE:

> Q. .... So the fact that Mr. Griffin was a black was a factor in your decision to promote him to the vacant position, isn't that correct?
>
> A. Yes, it was.
>
> Q. If Mr. Griffin had not been black at all and had been white, Mr. Nist, would you have promoted him to the vacant position without an engineering degree and without any experience in transmission and distribution?
>
> A. I didn't face that particular decision. Had he not been a minority, I would have selected Mr. Sikora.

DLCO in April, 1983 entered into a Consent Decree with the federal EEOC to resolve pending employment discrimination litigation. DLCO under the terms of that Consent Decree was required to adopt a written Affirmative Action Plan pursuant to Executive Order 11246. Each Affirmative Action Plan had a duration of one year, and was

followed by a successor Plan. Only one Affirmative Action Plan was in force at any one time.

At the time of the Griffin promotion to MCE, DLCO had in effect an Affirmative Action Plan. DLCO did not, however, make the Griffin promotion pursuant to the Plan. Beck, Vice-President of Marketing & Customer Services, so testified:

> Q. I would like to show you an interrogatory question and answer of Duquesne Light Company. Would you turn to interrogatory eleven? The Interrogatories are there and the answers are on the next page.
>
> A. Okay.
>
> * * *
>
> Q. I would like you to read question eleven and the answer to question eleven, please?
>
> "A. Identify the Affirmative Action Plan utilized in the selection and promotion of James A. Griffin to the position of Manager, Construction and Engineering Department, Eastern Division.
>
> **Answer**: Duquesne Light objects to this interrogatory on the grounds that it did not use any Affirmative Action

> Plan to select or promote Mr. Griffin. Duquesne Light states, however, that its Affirmative Action Plan often is considered in connection with the filling of vacancies in its workforce and was considered with respect to the vacancy for Manger, Construction & Engineering, Eastern Division, which Mr. Griffin filled. The Affirmative Action Plan in effect at that time was the plan covering the period March 1, 1987, to February 28, 1988."
>
> Q. And is that answer correct?
>
> A. Yes, sir.
>
> Q. Duquesne Light did not use its Affirmative Action Plan to promote Mr. Griffin?
>
> A. That's correct.

Under a provision of the Affirmative Action Plan, DLCO was required to complete reports showing what actions had been taken pursuant to the Plan. No report or reports prepared under the Affirmative Action Plan concerning the Griffin promotion could be located by DLCO and none were therefore introduced at trial.

Donald O. Messner, who in 1987-1988 was the Vice-President of the Administrative Services Group, testified that he was the official in charge of the Affirmative

Action Plan. Messner testified that he was not consulted at all in connection with the Griffin promotion and was unaware at the time that Nist and Beck had promoted Griffin because of his race.

C. MCCU Promotion Claim: Retaliation

Given the question presented by Duquesne Light in its Petition, it is unnecessary to set forth the factual background of the retaliation claim. The Court of Appeals very briefly summarized that evidence in holding that the jury's verdict finding retaliation was supported by sufficient evidence. Petition, at 7a.

COUNTERARGUMENT

I.

THE TRIAL COURT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *JOHNSON V. TRANSPORTATION AGENCY, SANTA CLARA COUNTY*, 480 U.S. 616 (1987), AND *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989).

The Court of Appeals in its "Not-For-Publication" Memorandum Opinion noted that Duquesne Light had difficulty in coming to grips with the central fact of this case, that the promotion of the black Griffin to the vacant

MCE position was not done pursuant to Duquesne Light's Affirmative Action Plan:

> The core flaw in Duquesne's argument is the fact that, although it sought to justify the March 1, 1988 promotion of James Griffin over plaintiff to the vacant position of Manager, Construction and Engineering ... on the grounds of affirmative action, there is testimony by the manager responsible for the disputed promotion decision that although Griffin's race was a determinative factor, the decision was NOT made pursuant to Duquesne's affirmative action plan. Duquesne attempted unsuccessfully to nuance the problem at oral argument. We conclude that the jury was entitled to rely on its manager's testimony.
>
> Memorandum Opinion, Petition for Writ of Certiorari, at 6a (emphasis in original).

The difficulty which Duquesne Light's counsel experienced at oral argument before the Court of Appeals in attempting to "nuance the problem" continues in this Court. The Petition for Writ of Certiorari does more than just "nuance" the problem. The Petition fails altogether to inform this Court that: (1) Duquesne Light's own manager at trial testified that the promotion was not made pursuant to the

Affirmative Action Plan at all; and (2) that the jury, asked in a special verdict interrogatory, so found.

There is a considerable body of federal caselaw which holds that discrimination on the basis of race outside the parameters of a valid affirmative action plan is never lawful. See, e.g., *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989); *Lilly v. City of Beckley*, 797 F.2d 191 (4th Cir. 1986); *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981); *Wilmington Fire Fighters v. City of Wilmington*, 632 F. Supp. 1177 (D. Del. 1986). By admitting that its race-based promotion decision was not made pursuant to its Affirmative Action Plan, Duquesne Light placed itself hopelessly outside the narrow bounds of permissible affirmative action.

In its Petition, Duquesne Light purports to present as its first issue a question involving the relationship between the decisions of this Court in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *Price Waterhouse v Hopkins*, 409 U.S. 228 (1989), suggesting that it is unclear how a district court should conduct a trial and instruct a jury in a case in which the employer asserts that it has made a race-conscious decision pursuant to its Affirmative Action Plan and simultaneously asserts that it would not have promoted the complaining white employee in any event for some non-race related reason.

We submit that the present case is a remarkably poor

vehicle for the consideration of any such issue. Duquesne Light, by the testimony of its own manager, took the Affirmative Action Plan completely out of the case. The district court was unnecessarily generous in even submitting to the jury the question whether the race-based promotion was done pursuant to a valid affirmative action plan. The jury answered that special interrogatory in the negative, which was not in the least surprising given the testimony of the employer's executives.

Taking the question presented on the merits, however, there is nothing even questionable much less interesting in the District Court's handling of the case.

Under *Johnson v. Transportation Agency*, *supra*, this Court has held that when an employer defends an employment discrimination case by asserting that an admittedly race-based decision was made pursuant to an affirmative action plan, then the traditional burden-of-proof mechanisms of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply:

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. *The existence of such an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the*

> *employer's decision*, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.
>
> 480 U.S. at 626 (emphasis supplied).

The District Court in fact instructed the jury that Duquesne Light first had the burden of coming forth with evidence "that it had an Affirmative Action Plan, that the employment decision was made pursuant to the affirmative action plan, and that the employment decision was authorized to be made under that plan." The district court then instructed the jury that plaintiff Claus would then have the burden of proving to the jury by a fair preponderance of the evidence that the Affirmative Action Plan was invalid. The District Court then gave a carefully-crafted instruction, drawn from the text of *Johnson v. Transportation Agency*, of what plaintiff would have to prove to demonstrate that an affirmative action plan was invalid.

It is difficult to understand in what manner Duquesne Light contends that the District Court failed to follow and apply *Johnson v. Transportation Agency*. And, of course, the fact of the matter is that Duquesne Light's affirmative action defense probably failed right at the first step, required by this Court, that the employer "articulate[] ... the plan as the basis for the employer's decision." Duquesne Light disavowed the plan as the basis for the decision, and the

jury doubtless took Duquense Light at its word on this point.

Duquesne Light also contended that quite apart from the question of race, it would not have promoted plaintiff Claus for other reasons. It claimed that Claus was a rigid and inflexible manager, and that he would be likely to exacerbate relationships with unions and unionized employees. This contention clearly turned the case into a "mixed motives" case within the meaning of this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which this Court held that the employer has the burden of proof on the "mixed motive" factual question. Under this Court's decision in *Price Waterhouse*, of course, the plaintiff still has the burden of proving that he was discriminated against on the basis of race. The employer's burden of proof relates only to the non-racial mixed motive. The District Court, therefore, applied *Johnson v. Transportation Agency,* instructed the jury that plaintiff had the burden of proof to demonstrate the invalidity of the Affirmative Action Plan (assuming the jury found that the employer had articulated the plan as the basis for its actions), and then instructed the jury that on Duquesne Light's contention that it would not have promoted Claus in any event for non-race related reasons particular to Claus, Duquesne Light had the burden of proof.

The District Court, therefore, conducted this trial perfectly in accord with *Johnson v. Transportation Agency* and *Price Waterhouse v. Hopkins*. Frankly, we do not even

understand or follow Petitioner's arguments to the contrary. Nor did the Court of Appeals, which rejected the argument in an opinion marked "Not-for-Publication."

II.

THIS COURT'S INTERPRETATION OF 42 U.S.C. § 1981 IN *PATTERSON V. MCLEAN CREDIT UNION*, 491 U.S. 164 (1989), HAS BEEN LEGISLATIVELY OVERRULED BY THE CIVIL RIGHTS ACT AMENDMENTS OF 1991. AN ISSUE INVOLVING THE APPLICATION OF THE HOLDING OF *PATTERSON V. MCLEAN* IS BY DEFINITION NOT WORTH REVIEWING.

This Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), interpreted 42 U.S.C. § 1981, holding that in a failure to promote case Section 1981 would not be violated unless there were such a difference between the plaintiff's existing position and the position to which the employee sought promotion so as to constitute a "new and distinct relation" between employer and employee. The courts of appeals had notable difficulty in applying this "new and distinct relation" test to promotion cases. In November, 1991, Congress specifically overruled *Patterson v. McLean Credit Union* in a provision of the Civil Rights Act Amendments of 1991, Pub. L. 102-166, Title I, § 101, Nov. 21, 1991, codified at 42 U.S.C. § 1981(b), (c). See

"Statutory Provisions Involved," *supra*.

Prior to this Court's decision in *Patterson*, the lower federal courts had experienced no difficulty in holding that 42 U.S.C. § 1981 encompassed claims of retaliation against an employee for having asserted rights protected by Section 1981. See, e.g., *Winston v. Lear-Siegler, Inc.*, 558 F.2d 266 (6th Cir. 1977); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146 (8th Cir. 1981); *London v. Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981); *Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. 1981); *Goff v. Contintental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Setser v. Novak Investment Co.*, 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1984); *Choudhury v. Polytechnical Institute of New York*, 735 F.2d 38 (2d Cir. 1984); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979), *aff'd in part, rev'd in part, remanded in part*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981). Before *Patterson*, no federal court had even suggested that Section 1981 might not encompass retaliation claims.

After this Court's decision in *Patterson* in 1989, cases were presented in which the plaintiff in a case in which 42 U.S.C. § 1981 would not generally apply nevertheless asserted that his 42 U.S.C. § 1981 claim was valid because retaliation was alleged. See, e.g., *Williams v. First Union National Bank of North Carolina*, 920 F.2d 232 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 353 (1991)(retaliatory working conditions); *Carter v. South*

Central Bell, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2916 (1991) (retaliatory discharge); *Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1306 (1991) and 113 S.Ct. 1270 (1991)(retaliatory discharge); *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S.Ct. 207 (1993)(retaliatory discipline and discharge). All of these post-*Patterson* "retaliation" cases have a common denominator: they are cases in which the employer either discharged the employee, harassed the employee with respect to working conditions, or demoted the employee. The charge of "retaliation," in other words, was being used in a setting in which *Patterson* had either directly held (racial harassment) or in which the lower fedral courts thought *Patterson* had held (discharge, demotion) that Section 1981 did not apply. These cases, therefore, do not stand for the proposition that Section 1981 does not ever encompass retaliation. Rather, they stand for the much more limited proposition that a claim of "retaliation" cannot be used to make actionable under Section 1981 that which *Patterson* had indicated was not actionable: claims of racial harassment post-employment; claims of termination; claims of demotion; claims of discriminatory working conditions. No post-*Patterson* case has ever held, or even suggested, that this Court in *Patterson* had disapproved of the use of Section 1981 to remedy racially-based retaliation where the employer had refused to "make" a contract within the core meaning of Section 1981. And no federal court has ever held in the context of a failure to promote case which did satisfy the "new and distinct

relation" test of *Patterson* that a retaliation claim is not cognizable under Section 1981 as well.

The Court of Appeals carefully reviewed the factual record to determine whether the two promotion opportunities involved here -- the MCE and the MCCU positions - represented a significant enough step up the corporate ladder compared to Claus' existing position to satisfy the "new and distinct relation" test of *Patterson*. The Court of Appeals wrote:

> "While the issue is close, we are satisfied that the transition from plaintiff's existing job as an engineer to either of the other jobs would have involved significantly different responsibilities and relationships. Both of the promotions would have elevated Claus from a practicing engineer to the ranks of senior management, giving him supervisory responsibility over 250 employees in the case of the Manager of C&E position or over 105 employees in the case of the Manager CC & U position and endowing him with very substantial budgetary responsibility in either case. Such profound distinctions in day-to-day functions are clearly distinguishable from the marginal differences in power rejected in *Bennum [v. Rutgers State University*, 941 F.2d 154, 169 (3d Cir. 1991)], where the only difference between the academic ranks

> was the eligibility to vote on tenure decisions."
>
> Petition for Certiorari, at 8a.

Petitioner does not present to this Court the question whether the Court of Appeals was correct in holding that the "new and distinct relation" test was satisfied by the evidence in this case. For purposes of this Petition, therefore, it is a given that the *Patterson* test was satisfied and that Claus had valid Section 1981 claims for his non-promotion to the MCE position and for non-promotion to the MCCU position.

So the question actually presented becomes: Is 42 U.S.C. § 1981, as interpreted by this Court in *Patterson v. McLean Credit Union*, violated where an employee seeks promotion to a position, where the promotion position satisfies the "new and distinct relation" test of *Patterson*, and where the employee proves that he was denied the promotion in retaliation for his having filed a complaint with the EEOC alleging racial discrimination in an earlier promotion decision which also satisfied the "new and distinct relation" test of *Patterson*?

We suggest that there are two answers to this question:

1. Yes, 42 U.S.C. § 1981 is violated on those facts, even assuming that *Patterson v. McLean Credit Union* remained good law.

2. *Patterson v. McLean Credit Union* is no longer good law, has been legislatively overruled, and any question involving the applicability of *Patterson* to the facts of this case can have no importance whatever save to the parties to this case. The question is not therefore worthy of review.

Respectfully submitted,

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